

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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ELMER F. SHEPARD and  
KATHRYN M. SHEPARD,  
his wife,

*Appellants,*

vs.

CAL-NINE FARMS, a corporation,  
*Appellee.*

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APPELLANTS' PETITION FOR REHEARING

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KRAMER, ROCHE & PERRY  
and F. HAZE BURCH

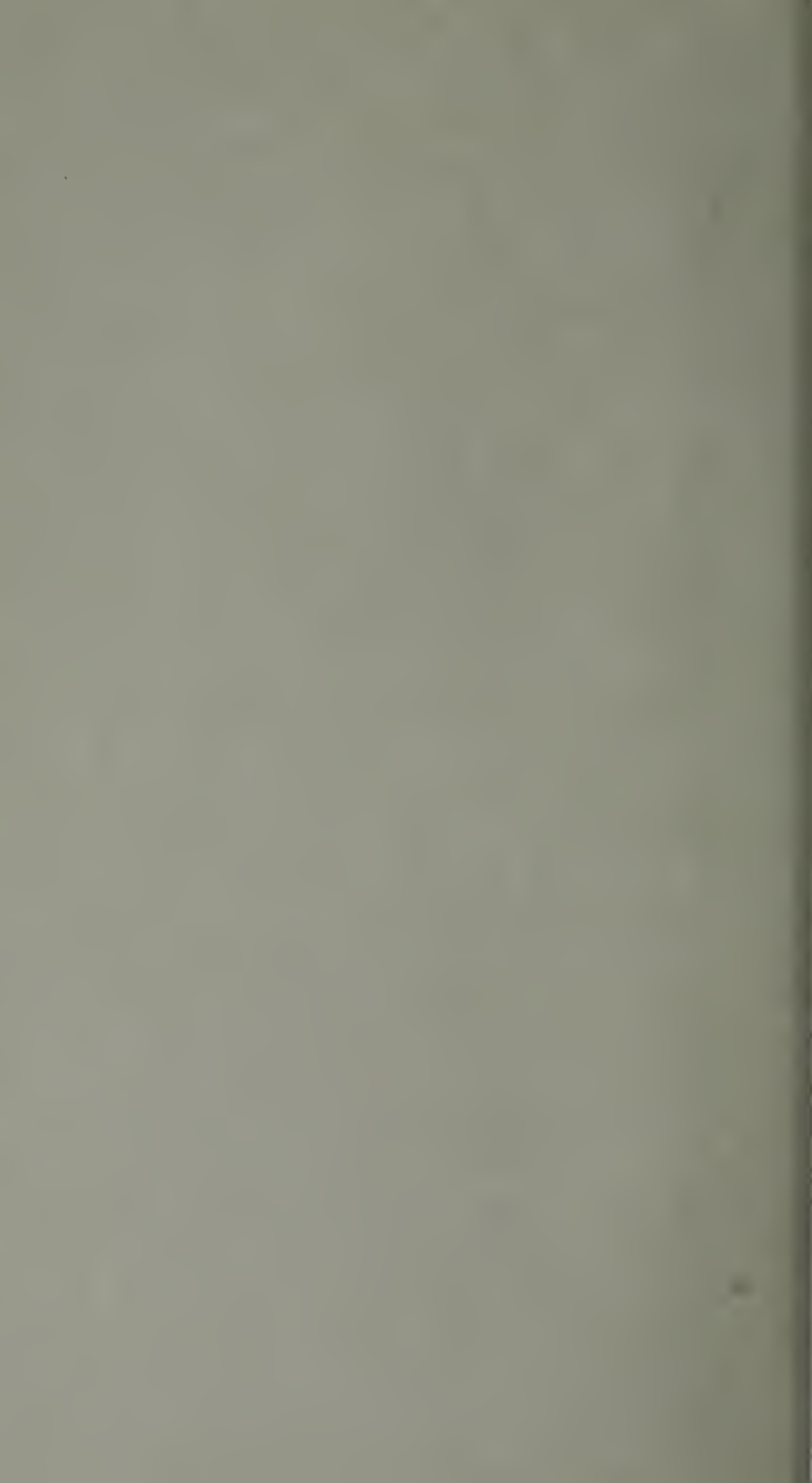
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APPELLANTS' PETITION FOR REHEARING

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To the Honorable William Healy, Walter L. Pope and  
Dal M. Lemmon, Judges of the United States Court  
of Appeals for the Ninth Circuit:

Appellants respectfully petition for a rehearing in  
the above cause to the end that the Judgment of this  
Court affirming the judgment of the District Court  
be vacated and the judgment of the lower Court re-  
versed.

GROUND FOR REHEARING

Appellants respectfully urge that the opinion and  
judgment are erroneous and contrary to law, and that  
a rehearing should be granted for the following four  
reasons:

1. The Court has incorrectly assumed that since  
there was evidence sufficient to support the need for  
and the cost of the new well, and also evidence to sup-

port the award for crop damage, the “benefit of bargain rule” as followed by the Arizona Supreme Court, has been met. The Court has failed to consider that the Appellants were precluded from showing a different amount of damages by the ruling, when the case law of Arizona specifically reserves to appellants that right as set forth in the case of *Lutfy vs. R. D. Roper and Sons*, 57 Ariz. 495, 115 P. (2d) 161.

2. The Court erroneously assumes that had appellants been allowed to produce testimony relating to the value of the land that damages would not have been materially different. This assumption is in direct conflict with the decision of the Arizona Supreme Court in the case of *Wooley vs. Locarnini*, 18 Ariz. 539, 164 P. 319, and again precludes the appellants from having their day in Court to actually prove the difference in damage.

3. The Court has erroneously assumed that the District Court has the right to take a “short-cut” in the law and avoid a strict conformance with the case law of the State of Arizona, as promulgated by the Arizona Supreme Court. Such a determination violates the doctrine laid down by the United States Supreme Court in *Erie R. Co. vs. Tompkins*, 1938, 304 U.S. 64, 82 Law Ed. 1188, 58 Sup Ct. 817, 114 A.L.R. 1487, and affirmed by this Court in *New York Life Insurance Co. vs. Rogers*, 126 Fed (2d) 784 (C.C.A. Ariz.)

4. The Court has failed to consider that under its ruling the appellants are forced to accept the appellee’s statements as to the damages and are prevented from producing evidence rebutting or contradicting appellee’s position. Appellants contend that if appellee is entitled to the benefits of an extremely liberal interpretation of the Arizona “benefit of bargain” rule on



damages, then appellants have the right to produce evidence in strict compliance with said rule, and under the Court's ruling this right has been denied them.

## ARGUMENT

### THE VALUE OF LAND UNDER THE "BENEFIT OF BARGAIN" RULE CAN ONLY BE DETERMINED BY DIRECT TESTIMONY

Costs of drilling a new well have no actual relationship to land value that can be determined by the Court. The District Court and the Court of Appeals have both "assumed" that the cost of a new well indicated the reasonable depreciated value of the land sold. Appellants wish to point out, however, that the Court fails to consider the obvious fact that desert land known to have water available underneath it certainly has a different value from desert land not known to have water beneath it. This is the reason that direct testimony is necessary under the Arizona Benefit of Bargain rule, as to the value of the land as it actually was, and the value as it was represented to be. A perusal of the transcript of the proceedings in the District Court will reveal that the appellants attempted to elicit information as to the actual value of the land from the Appellees' own witnesses, and were precluded by doing so by ruling of the Court (Tr. pages 217-218). The Court, in accepting testimony, only as to the cost of drilling a new well, deprived the Appellants of any possibility of showing a different measure of damages. Thus, even though desert land with water under it may have a different value from desert land that is undeveloped with no known water supply, this evidence was not available to the Court, nor were Appellants given the opportunity to prove such a condition, if, in fact, it does exist. Appellants made every effort

to produce this type of information, but the Court's ruling summarily precluded any further showing of this nature, as indicated by the transcript sections cited above.

The Court is referred to the first Arizona case setting forth the Arizona Supreme Court's ruling on the Benefit of Bargain rule of damages which is *Wooley vs. Locarnini*, 18 Ariz. 539, 164 P. 319. In this case, which involved an allegation of fraud in the sale of land, the Arizona Supreme Court states as follows, at 18 Ariz. page 548:

"Whether the land was of a value less than the purchase price was the issue on trial. If found to be of a less value, then the measure of damages was the difference between the actual value as found and the actual value it was represented to be as represented by the purchase price paid for the land. This is the rule the jury were instructed to follow, and is the correct rule of damages under the pleadings in this case."

In this same case the Supreme Court found on page 550 that the jury determined that fifteen acres of the land sold was worthless, but that sixty-five acres of the land sold was, in fact, worth more than the purchase price, and the Court further states that the seller was entitled to a credit for the value that this sixty-five acres of land had over and above the purchase price per acre. The record in the Court below is totally devoid of any indication that the value of the land purchased by the buyers was the purchase price of \$80,000.00, less the costs of drilling a new well. The record is totally devoid below of any indication as to the actual value of the land. The reason for this void in the testimony is, in Appellants' opinion, directly attributable to the ruling of the Court which Appellant has set forth as error.



## II.

THE PURPOSE OF THE "BENEFIT OF BARGAIN" RULE IS TO REQUIRE THE SELLER IN A CASE OF FRAUD TO MAKE GOOD HIS REPRESENTATIONS.

In the case of *Curry vs. Windsor*, 22 Ariz. 108, 194 P. 958, the Arizona Supreme Court states as follows:

"The only reasonable construction we are able to place upon the pleadings is that the cross-complaint constitutes an action on the case for deceit. If we are correct in this conclusion, then the true rule of damages in case of a verdict for *Windsor* is the difference between the actual value of the lots he received and their value if the alleged fact regarding them had been true. *Curry* is to make good his representations of fact as though he had given a warranty to that effect. *This rule makes recovery exactly commensurate with the injury.*" *Curry vs. Windsor*, 22 Ariz. at page 111.

Appellants contend that the ruling of the District Court prohibiting Appellants in the trial below from producing testimony as to the actual value of the land prevents a determination of damages "exactly commensurate with the injury." To assume that the value of the land was depreciated exactly in the amount of the cost of drilling a new well, without considering whether or not the land sold actually had a greater value than represented, as was considered in the case of *Wooley vs. Locarnini*, cited above, is error under the Arizona rule.

It is additionally pointed out to the Court that the cost of drilling the new well was based upon the condition of the well almost one year after the sale, when, according to the testimony in the Court below, the Cal-Nine Corporation, through its officer, Otto, determined

that the existing well was of no value. (See TR. page 144.)

The Court is referred to the case of *Ren vs. Jones*, 38 Ariz. 476, 1 P. (2d) 110, which was a case involving fraud in the sale of an automobile. The "Benefit of Bargain" rule was applied in this case, and the Supreme Court of the State of Arizona states as follows:

*"The important inquiry was its condition at the time of sale, for the measure of damages was the difference between the actual value of the car at that time and its value as represented by Appellant."* *Ren vs. Jones*, 38 Ariz. at page 479 (Emphasis supplied).

The ruling of the District Court on the "Benefit of Bargain" rule violates this principle as set forth by the Arizona Supreme Court, because it was the District Court's ruling that the cost of drilling a new well many months after the time of sale was the basis for damages. As indicated in each of the Arizona cases heretofore cited to the Court, the correct rule was the difference between the actual value of the land *at the time of sale, and the value as represented by the Appellant at that time*. The record is void of any evidence of this nature as required by the Arizona Supreme Court rule.

## III.

THE VALUE OF THE PROPERTY SOLD IS A NECESSARY ELEMENT IN ARRIVING AT DAMAGES SUFFERED UNDER THE ARIZONA "BENEFIT OF BARGAIN" RULE AND FAILURE TO PRODUCE THAT VALUE AND PROVE IT IN COURT IS ERROR.

In the case of *Lufty vs. Roper*, 57 Ariz. 495, 115 P. (2d) 161, the Supreme Court held that the plaintiff's damage in a case involving fraud in the sale of an automobile under the benefit of bargain rule, was the difference in value between the car he bought and the one he wanted and was told by the seller he was getting, but did not. The Court held that the trade-in value of the automobile purchased was inadmissible, even for impeachment purposes. The basis of the Court's ruling as indicated above was founded upon the proposition that such testimony did not relate to the value as represented and the actual value at the time of sale. *Lufty vs. Roper*, 57 Ariz. at page 505.

Referring the Court again to the case of *Ren vs. Jones*, cited above, the Arizona Supreme Court in this case affirmed a ruling of the Superior Court denying a party litigant the right to examine a motor vehicle, and to testify as to its present value, the Court stating:

"The important inquiry was its condition at the time of sale, - - -." *Ren vs. Jones*, 38 Ariz. at page 479.

Appellants contend the plaintiffs below failed to show any evidence as to the actual value of the land sold at the time of sale, and that this failure to follow the Arizona rule was reversible error.

## IV.

THE VALUE OF LAND UNDER THE "BENEFIT OF BARGAIN" RULE CAN ONLY BE DETERMINED BY DIRECT TESTIMONY. COSTS OF DRILLING A NEW WELL HAVE NO RELATIONSHIP TO LAND VALUE.

Appellants contend that a reasonable interpretation of the rulings set forth by the Arizona Supreme Court in the *Lufty* case, the *Ren* case, and the *Curry* case, cited above, restrict testimony as to damages in fraud cases to evidence of actual value of the property sold *at the time of sale*, and evidence as to the representations as to value.

The Arizona Supreme Court in its rulings in the *Lufty* case and the *Ren* case has twice indicated that the cost of repairs, replacements, etc., have no value in determining damages in fraud cases. As the Court stated in the case of *Hidalgo vs. McCauley*, 50 Ariz. 178, 70 P. (2d) 443, in a case involving fraud in the sale of stock:

"If the only action was on account of Shreve's fraudulent representations to the plaintiff as to the value of the stock which they accepted the damages would be the difference between what the stock was actually worth *at the time they got it and what Shreve had represented it to be worth.* *Hidalgo vs. McCauley*, 50 Ariz. at page 185. (Emphasis supplied)

By restricting testimony in the District Court to plaintiff's evidence as to the cost of repairs the Court, in effect, prevented defendants therein and Appellants here from presenting evidence as to the actual value of land sold at the time of sale. In other words, the District



Court by its ruling required Appellants to accept the cost of repairs as the only evidence in relation to damages and although such evidence might have been of some value under the most liberal interpretation under the Arizona Benefit of Bargain rule, the Court's ruling that Appellants could not introduce evidence in strict conformity with the Arizona Rule (TR 217-218) deprived them of a right reserved to them under the rules of damages as promulgated by the Arizona Supreme Court.

## CONCLUSION

The problems presented by this case were numerous and counsel appreciates that long and careful consideration was given the matter before a decision was reached. Appellants believe, however, that the decision of this Court is founded on an assumption that the value of the land sold by Appellants Shepard was the purchase price of \$80,000.00, less the cost of drilling a new well. In the light of all of the Arizona cases extant which have been cited to the Court, Appellants respectfully urge that such an assumption is erroneous, and that the District Court, in trying the matter, had no right to make any such assumption or take any legal shortcut. Appellants believe that the District Court was required to follow exactly the rule of the Arizona Supreme Court as laid down in the cases heretofore cited, which is as follows:

“The measure of the damages sustained by the purchaser where a purchase has been induced by fraud is according to the weight of authority, the difference between the real value of the property purchased and the value which it would have had had the representations been true.” *Lufty vs. Roper*, 57 Ariz., at page 502; 27 C.J. 92 §243.

We strongly urge the court to reconsider its decision in the light of the law herein presented, and upon such reconsideration we ask that a rehearing be granted.

Respectfully Submitted,

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#### CERTIFICATE OF COUNSEL

In my judgment the foregoing petition for rehearing is well founded. I hereby certify that it is not interposed for delay.

Dated at Phoenix, Arizona this 24th day of February, 1958.

F. HAZE BURCH